Why the Brexit debate might mark the end of Britain's unwritten constitution

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A month ago British political scientists noted that a "decade of constitutional debate" lay ahead for Britain [1]. Now, a month later, lawyers proclaim "that the Article 50 case may be the most important constitutional case for a generation." Both comments emphasise the importance of constitutional guidance at a time when the country is struggling to agree on how to implement the referendum vote on Brexit.

As Article 50 TEU details: "Any Member State may decide to withdraw from the Union *in accordance with its own constitutional requirements*"[2]. Given the precedence of the situation not only in the United Kingdom but Europe-wide, the interpretation of what exactly such constitutional guidance entails, matters crucially. An acceptable solution to the procedural issues of the Brexit process would benefit from constitutional guidance. The tense debate about whether or not Parliament should have a vote, and at which time (i.e. before or after triggering the Article 50 procedure), that is currently present in all British media and social media shows that, if anything, such guidance is lacking, as the constitutional framework leaves considerable margins for interpretation.

Mistrust has been growing on either side of the conflicting parties. While Parliament demands the right to vote on the matter, Government suspects that such a vote would seek to reverse the referendum outcome. In this situation, ordinary citizens have turned to the courts for judicial review to rule whether or not Parliament should be enabled to exercise their right to vote; and if so, when (i.e. before or after the Article 50 procedure is triggered); and – importantly – whether or not the involved court documents should be made available to the public. The case brought before the High Court by the "People's Challenge" on the 13th of October (CO/3809/2016 & CO/3281/2016) has already revealed that Prime Minister Theresa May intends to make use of the ancient instrument of evoking royal prerogative power which effectively circumvents Parliament.

This comment *holds* that the current development suggests that not only the Brexit decision may become subject to revision, but the uncodified constitution may become subject to scrutiny as well. So far, the absence of a written constitution was generally viewed as a sign of "stability of the British polity."[3] However, the Brexit contestations may change that, and, on the long run, the status of an 'unwritten' or 'uncodified constitution' may well come to an end. The present *constitutional turn* in British politics suggests that the long period of stability of the British polity is challenged, just as the Brexit campaign promised the contrary. This comment demonstrates why this is the case.

I argue that the court case has created a window of opportunity for politics and law. The window works in two ways. *First*, along a more general political dimension, the court case puts Brexit onto the political agenda: by turning it into a daily news item, the political class is forced to react. This attributes additional legitimacy to the ongoing contestation about sovereignty in parliament. *Second*, with regard to more specific detail, the decision to make all case documents available to the public sheds light on the issues raised by the contestants in court, especially, the case made by the Government. Thus, the case has revealed that it is Prime Minister Theresa May's intention to take the decision about triggering the Article 50 procedure based on royal prerogative power. Notably, the "defining characteristic of the prerogative is that its exercise does not require the approval of Parliament."[4] This specific power has rarely been evoked except for specific cases. According to the UK government, in modern times it serves mainly to deal with citizenship issues claiming that, in their majority, Royal Prerogative cases include the issuing (or refusal) of passports. As opposed to "executive prerogative" power, royal prerogative power has traditionally been assigned to the monarch and was mainly used to declare war.

By revealing the May's plan to use the royal prerogative, the Government's mantra-like reiteration of a deep respect for democratic principles, which demand acceptance of the referendum result,[5] suddenly appears

questionable. As the Prime Minister seeks to circumvent Parliament, sovereignty in Parliament – another constitutional principle that is deeply engrained in British constitutional practice, has been moved into the spotlight.

The revelation regarding the use of the royal prerogative comes at a critical moment in British politics when the public has been held back from contesting the referendum result, despite many good reasons to the contrary. In effect, this decision means that the UK's core constitutional of sovereignty in parliament has not only been trumped by the fairness principle (i.e. accepting the result of the referendum) but it has been undermined from above by the strategy of referral to the royal prerogative. While the principle of fairness vis-à-vis the referendum result has so far been upheld by the British public including the leaders of the remain campaign, the top-down instrument of the royal prerogative is likely to turn this acceptance around. This may come at considerable political costs for the current Government. As attorney general Jeremy Wright QC admits: "This is not a narrow legal challenge (…). It seeks to invalidate the decision already taken to withdraw from the EU."[6]

In this situation, the claimants' argument that "only *parliament* can lawfully 'decide' to leave the EU for the purposes of article 50[of the treaty]; and that the [government] may only 'notify' such a decision to the European council under article 50(2) once [it] has been properly authorized to do so by an act of parliament"[7] is gathering momentum. The case has already generated wide public debate. According to the representative of the People's Challenge the "court's order allows a *floodlight to be shone* on the government's secret reasons for believing it alone can bring about Brexit without any meaningful parliamentary scrutiny."[8] Given the decision to publicly disclose the claim, notably and importantly, the arguments will not only be tested in court but they are now available for public debate as well (Ibid.) This enhances the role of the current constitutional turn in the UK. The development is particularly significant in light of a period of shock and inertia: Even though a number of arguments could have been legitimately raised to contest the referendum result, for example, first, the referendum is not legally binding; second, it was won by a tiny majority of 3.8%[9]; third, it was achieved based on a campaign that was misleading the voters based on outright lies and false promises as admitted by the leaders after the vote; forth, it led all of the leaders to resign in the aftermath of the vote; and fifth, it left the political class largely clueless about strategies towards Brexit, the reactions of those who voted to remain in the European Union have appeared as if in a state of inertia for the past four months. This was paired by a divided political class and a Prime Minister who refused to "reveal her hand prematurely" on the Brexit negotiations.

The current legal case has changed this situation. It created a window of opportunity that enabled political discussion from the bottom-up, and constrained political action on behalf of the political class. Crucial to this was the September decision of the court that all documents were to be disclosed to the public. According to political science, a window of opportunity opens when in a situation that appears to be locked in by formal constraints, an unexpected change of context (for example, an external event, a major institutional change, or any event causing politics to confront novel aspects) creates an opening for a political move. In the British post-referendum context that was locked by the referendum result over the past four months, such an intervention was created by the legal claim against triggering the Article 50 procedure before the British High Court of Justice. The opportunity was considerably backed by the fact that the court ruled – against the interest of the Government – for all court documents to be accessible to the public[10].

In the post-referendum and pre-Brexit debate in Britain the court case has created a political window of opportunity both for the immediate interest of the remainers, and with regard to readjusting the legitimacy of British EU politics. Four months into the post-referendum contestations, the details of the procedure that is to trigger Article 50 has been challenged before the High Court of Justice. Known as the "People's Challenge" to the Government on Art. 50, this court case centres on nothing more and nothing less than the question of whether, in the United Kingdom, sovereignty is held by individual voters only, or whether it is based in Parliament. While voters are involved in both, a referendum means that political debate in order to clarify issues with or contest the substantive meaning of an issue is placed before the vote and solely subject to campaigning. By contrast, sovereignty in parliament means that the electorate votes for their representatives who then debate about issues before taking a decision in parliament. With the case before the UK's High Court of Justice for a week, at the time of writing this comment, the discussion about sovereignty in parliament has been taken up by the media and been picked up by public debate as presented by the press and social media.

[1] See Simon Bulmer's contribution to the discussion at the roundtable 'The EU in Crisis', UACES conference, London 5th September 2016.

[2] See: Article 50, Treaty of European Union, Consolidated Version, 2010, 44 (emphasis added AW)

[3] As the Constitution Unit at the University of London explains, this meant that it "has never been thought necessary to consolidate the basic building blocks of this order in Britain. What Britain has instead is an accumulation of various statutes, conventions, judicial decisions and treaties which collectively can be referred to as the British Constitution. It is thus more accurate to refer to Britain's constitution as an 'uncodified' constitution, rather than an 'unwritten' one."

[4] See: Poole, Thomas, United Kingdom. The Royal Prerogative, International Journal of Constitutional Law (2010) 8 (1): 146-155, at p 164

[5] As May reiterated again and again, „we are respecting the views of the British people." See: *Daily Mail, 8 September 2016*.

[6] See *The Guardian 17 October 2016*.

[7] The Guardian, 28th September 2016

[8] John Halford, a solicitor partner at Bindmans law firm, which represents the People's Challenge (emphasis added AW).

[9] The referendum was held on 23rd June 2016 and won by a majority of 3.8% (equalling 1.269.501 or 51.9% of the vote, based on a 72% voter turnout). For the detailed referendum data see here.

[10] According to Justice Cranston: "It is difficult to see justification for restricting publication of documents which are generally available under the rules."

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